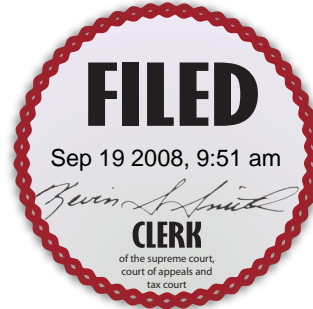


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

JOHN T. WILSON
Anderson, Indiana

ATTORNEY FOR APPELLEE:

DOROTHY FERGUSON
Staff Attorney
Madison County Department of Child Services
Anderson, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

BRIAN SMITH,)	
)	
Appellant-Respondent,)	
)	
vs.)	No. 48A02-0803-JV-222
)	
MADISON COUNTY DEPARTMENT)	
OF CHILD SERVICES,)	
)	
Appellee-Petitioner.)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Jack L. Brinkman, Judge
Cause No. 48D02-0706-JC-280

September 19, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Respondent Brian Smith (“Smith”) appeals the juvenile court’s determination that his daughter H.S. is a Child in Need of Services (“CHINS”). We affirm.

Issues

Smith presents three issues for review:

- I. Whether the videotaped testimony of H.S. was admitted in compliance with Indiana Code Section 31-34-13-3;
- II. Whether Smith was denied due process of law because his attorney did not appear at either the hearing on admissibility of child hearsay or the fact-finding hearing; and
- III. Whether the evidence is sufficient to support the juvenile court’s adjudication of H.S. as a CHINS.

Facts and Procedural History

H.S. was born on November 10, 2003 to Smith and his wife, Melanie. Melanie stabbed Smith and was sentenced to three years imprisonment in the Indiana Department of Correction. H.S. was informally placed with her maternal grandmother and maternal aunt and a protective order prohibited Smith from contacting H.S.

On June 19, 2007, an emergency custody hearing was conducted by the Madison County Superior Court. The trial court awarded joint physical and legal custody of H.S. to her maternal grandmother and maternal aunt. The trial court also ordered the parties to “attempt to agree on visitation arrangements with the respondent father.” (App. 14.) Smith began to take H.S. on unsupervised visits.

Subsequently, H.S. told her cousin, aunt, grandmother, and a child services investigator that Smith had touched her “vagy” and “butt” by inserting items such as a

Gatorade bottle and food products. (Ex. 1-2.) H.S. also reported that she was left outside “for a long time,” that her father had “slept naked with her” and “touched her with his penis on her throat when the moon came out.” (Ex. 7.)

On June 28, 2007, the juvenile court authorized the Madison County Department of Child Services (“the DCS”) to file a CHINS petition. The juvenile court then conducted a detention hearing at which Smith appeared personally and by counsel Steven Beach (“Beach”). Smith denied the allegations of the CHINS petition. The juvenile court preliminarily determined that H.S. should remain in the custody of her aunt and grandmother but that unsupervised visits between H.S. and Smith should terminate. A fact-finding hearing was set for July 17, 2007.

On July 11, 2007, the DCS filed a “Petition for Hearing to Introduce Child Hearsay Statements Pursuant to IC 31-34-13 et. seq.” (App. 23.) The juvenile court continued the fact-finding hearing, scheduled the child hearsay hearing for July 17, 2007, and sent a notice to Beach. Neither Smith nor Beach appeared on July 17, 2007. At the conclusion of the hearing, the juvenile court determined that H.S. was unavailable for testimony at the fact-finding hearing and that her prior videotaped statement would be admissible.¹ The juvenile court set the fact-finding hearing for August 7, 2007. Noting that Beach had filed no written appearance on Smith’s behalf, the juvenile court ordered that Smith be subpoenaed for the fact-finding hearing. Mailed notices were sent to Beach and to Smith, and additional copies were left at their residences.

¹ Melanie was transported from prison and was present at the admissibility hearing. The juvenile court also conducted an initial hearing as to Melanie, and Melanie admitted that H.S. is a CHINS.

On July 18, 2007, the DCS filed an amended petition. Due to court congestion, the juvenile court continued the fact-finding hearing until August 14, 2007 and ordered the DCS to provide notice to all parties. On August 8, 2007, a summons was issued to Smith to secure his attendance at the August 14, 2007 hearing.

On August 14, 2007, Smith appeared at the fact-finding hearing. For reasons not disclosed by the record, Beach did not appear. Smith indicated that he did not wish to proceed without counsel. The juvenile court treated the statement as a motion for a continuance. Observing that Beach had not entered a written appearance indicating his representation of Smith, the juvenile court denied the motion for a continuance. Evidence was heard and the juvenile court set a dispositional hearing date for September 13, 2007.

On August 15, 2007, the juvenile court issued an order finding H.S. to be a CHINS. On September 11, 2007, attorney John Wilson entered an appearance on behalf of Smith and moved to continue the dispositional hearing.

The juvenile court conducted a dispositional hearing as to Melanie on October 4, 2007 and conducted a dispositional hearing as to Smith on November 29, 2007. On December 26, 2007, Smith filed a Motion to Correct Error and a Motion for Relief from Judgment. On January 10, 2008, the juvenile court denied the motions. This appeal ensued.

Discussion and Decision

I. Admissibility of Child Hearsay Statement

Indiana Code Section 31-34-13-3 provides that a statement or videotape is admissible in evidence in an action to determine whether a child is a CHINS if, after notice to the parties

of a hearing and of their right to be present:

- (1) the court finds that the time, content, and circumstances of the statement or videotape and any other evidence provide sufficient indications of reliability; and
- (2) the child:
 - (A) testifies at the proceeding to determine whether the child or a whole or half blood sibling of the child is a child in need of services;
 - (B) was available for face-to-face cross-examination when the statement or videotape was made; or
 - (C) is found by the court to be unavailable as a witness because:
 - (i) a psychiatrist, physician, or psychologist has certified that the child's participation in the proceeding creates a substantial likelihood of emotional or mental harm to the child;
 - (ii) a physician has certified that the child cannot participate in the proceeding for medical reasons; or
 - (iii) the court has determined that the child is incapable of understanding the nature and obligation of an oath.

Smith contends that the juvenile court contravened the statutory provisions “by failing to conduct a hearing, by failing to give him notice of the hearing and by failing to make the required findings.” Appellant’s Brief at 7. However, contrary to Smith’s assertions, the record reveals that the juvenile court convened a hearing on admissibility after providing notice to Smith’s purported attorney at the address provided to the court. For undisclosed reasons, neither Smith nor Beach appeared.

At the hearing, no contested evidence was heard because Melanie, the DCS, H.S.’s custodians, and the Court Appointed Special Advocate advised the juvenile court that they did not oppose the admissibility of H.S.’s videotaped statement in lieu of live testimony due to the fact that she was then only three years old. The DCS then submitted into evidence six evidentiary exhibits including diagrams of body parts developed during the forensic interview with H.S.

In compliance with Indiana Code Section 31-34-13-3(1)(C)(iii), the juvenile court entered into the record the court's findings that the time, content and circumstances of H.S.'s videotaped statement provided sufficient indications of reliability, and that H.S. was unavailable to testify because she was incapable of understanding the nature and obligation of an oath. As such, Smith has failed to show that H.S.'s videotaped statement was admitted in contravention of statutory authority.

II. Due Process – Representation by Counsel

Smith contends that he was denied due process because he did not receive effective assistance from counsel he had purportedly retained to represent him. A fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Hite v. Vanderburgh Co. OFC, 845 N.E.2d 175, 181 (Ind. Ct. App. 2006). Procedural irregularities in a CHINS proceeding may be of such import that they deprive a parent of procedural due process with respect to a potential subsequent termination of parental rights. In re J.Q., 836 N.E.2d 961, 966 (Ind. Ct. App. 2005), reh'g denied. However, although a juvenile court has discretion to appoint counsel for a parent in any juvenile proceeding, a parent has no statutory right to court-appointed counsel in a CHINS proceeding. In re R.R., 587 N.E.2d 1341, 1345 (Ind. Ct. App. 1992).

Smith made no request for court-appointed counsel. He was afforded the opportunity to retain private counsel and purportedly did so. There was apparently a breakdown in communication between counsel and his client. Nevertheless, inasmuch as Smith had no entitlement to counsel, he is unable to cite authority for the proposition that he was denied due process because of the absence of counsel. Likewise, he is unable to demonstrate that he

was denied a fair hearing because counsel was retained but failed to provide effective assistance.

III. Sufficiency of the Evidence

Finally, Smith contends that the evidence was insufficient to support the juvenile court's determination that H.S. is in need of services. More specifically, Smith argues that false and unsubstantiated accusations were made against him.

The DCS had the burden of proving by a preponderance of the evidence that H.S. is a CHINS. In re C.B., 865 N.E.2d 1068, 1072 (Ind. Ct. App. 2007), trans. denied. When reviewing the sufficiency of evidence, we consider only the evidence most favorable to the judgment and the reasonable inferences to be drawn therefrom. Slater v. Marion Co. DCS, 865 N.E.2d 1043, 1046 (Ind. Ct. App. 2007). We do not reweigh the evidence or judge the credibility of witnesses. Id.

Indiana Code Section 31-34-1-1 provides:

A child is a child in need of services if before the child becomes eighteen (18) years of age:

- (1) the child's physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of the child's parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, medical care, education, or supervision; and
- (2) the child needs care, treatment, or rehabilitation that:
 - (A) the child is not receiving; and
 - (B) is unlikely to be provided or accepted without the coercive intervention of the court.

In order to establish that H.S. is a CHINS, the DCS presented the following evidence.

DCS investigator Kelli Louck ("Louck") testified that she had spoken with H.S. on five occasions and on four of those occasions H.S. disclosed "in one form or another" that Smith

had sexually abused her. (Tr. 85.) In Louck's opinion, the details of the statements were consistent. Louck testified further that H.S. had complained of vaginal pain. Louck conducted and recorded a forensic interview with H.S. at the Anderson Police Department. The videotaped interview, wherein H.S. described sexual abuse, was admitted into evidence. Evidence was adduced that H.S.'s older half-sibling feared for H.S.'s safety and had disclosed to a caseworker that Smith had previously shoved him and broken his arm. Finally, Detective David Callahan of the Madison County Sheriff's Department testified that Smith was under criminal investigation after a second child had accused Smith of sexual abuse.

As previously observed, we do not reweigh the evidence or judge the credibility of witnesses. Slater, 865 N.E.2d at 1046. The evidence favorable to the judgment amply supports the juvenile court's determination that H.S. is a CHINS.

Affirmed.

RILEY, J., and BRADFORD, J., concur.